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Public Health Emergency Ends May 11, 2023: Check Your Readiness

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After three years, the federal public health emergency (PHE) will expire **May 11, 2023**.¹ Most of the relaxed regulatory and payor standards will end on or within a few months after the deadline, including many relating to:

- Federal subsidies for PHE-related services.
- Medicare coverage and/or the amount of reimbursement for certain services, especially COVID-related care and telehealth services.
- Medicaid coverage for COVID-related services.
- Flexibility on standards relating to patient stays (e.g., use of skilled nursing facility (SNF) beds for patients who do not meet SNF criteria; critical access hospital (CAH) 25-bed and/or 96-hour length of stay requirements; etc.).
- Facility safety, staffing, and operational standards.
- Use of alternative or expansion sites to provide care (e.g., Hospitals Without Walls Programs; use of other sites to render hospital services; etc.).
- Practitioner supervision requirements.
- Charges and cost-sharing amounts for certain services, including COVID testing.
- Prescribing controlled substances through telehealth services as otherwise governed by the Ryan Haight Act.
- Use of non-HIPAA compliant modalities to conduct telehealth visits.
- Stark, Anti-Kickback Statute, and Civil Monetary Penalties waivers concerning arrangements with physicians, patients, and other referral sources.
- EMTALA guidelines concerning directing patients to other locations.
- PREP Act liability protections.²

Department of Health and Human Services (HHS) Guidance. As discussed in our prior client alert (available [here](#)), HHS has prepared a general roadmap (available [here](#)) along with a series of fact sheets for specific providers to help guide their transition, including:

- Physicians and Other Clinicians

- Hospitals and CAHs
- Ambulatory Surgery Centers (ASCs)
- Long-Term Care Facilities
- Home Health Agencies
- Hospices
- Inpatient Rehabilitation Facilities
- Community Mental Health Centers
- Rural Health Clinics and Federally Qualified Health Centers
- Laboratories
- Durable Medical Equipment, Prosthetics, Orthotics, and Supplies
- Ambulances

The facts sheets are available [here](#). Providers should review applicable fact sheets to confirm and comply with the revised standards after May 11, 2023. The Centers for Medicare & Medicaid Services (CMS) warned, “With this information in hand, we expect that the health care system can begin taking prudent action to prepare to return to normal operations and to wind down those flexibilities that are no longer critical in nature.”³

Continued Flexibility. Although many standards will return to pre-pandemic norms, some PHE measures will continue in their current or modified form, most notably certain standards concerning telehealth.⁴ For example, the Consolidated Appropriations Act of 2023 (CAA) extended certain PHE flexibilities relating to Medicare reimbursement for telehealth services through December 31, 2024, including the following:

- Federally Qualified Health Centers (FQHCs) and Rural Health Clinic (RHCs) can serve as a distant site provider for non-behavioral/mental telehealth services.
- Medicare patients can receive otherwise covered telehealth services in their home.
- There are no geographic restrictions for originating site for telehealth services.
- Some telehealth services can be delivered using audio-only communication platforms.
- An in-person visit within six months of an initial behavioral/mental telehealth service, and annually thereafter, is not required.
- In addition to other approved practitioners, Medicare will pay for telehealth provided by physical therapists, occupational therapists, speech language pathologists, and audiologists.⁵

The CAA also made some changes to tele-behavioral health reimbursement permanent, including the following:

- FQHCs and RHCs can serve as a distant site provider for behavioral/mental telehealth services.
- Medicare patients can receive telehealth services for

behavioral/mental health care in their home.

- There are no geographic restrictions for originating site for behavioral/mental telehealth services.
- Behavioral/mental telehealth services can be delivered using audio-only communication platforms.⁶

In addition, on February 24, 2023, the Drug Enforcement Administration (DEA) proposed new rules implementing the Ryan Haight Act, which generally prohibits prescribing controlled substances through the internet.⁷ If finalized, the rules would reaffirm the general requirement that controlled substances may only be prescribed after a provider examination but would allow prescriptions via telehealth encounters in limited circumstances.

HHS has published a helpful guide summarizing “Telehealth policy changes after the COVID-19 public health emergency,” available [here](#).

Remember State Rules. The foregoing discussion applies only to federal rules. Healthcare professionals and providers must also be aware of any additional state law requirements. Most state emergency standards have already ended. Many states have returned to pre-pandemic rules concerning telehealth requirements and/or Medicaid payment requirements, while others have enacted permanent changes given the PHE experience. Providers should review state rules and/or check with their local licensing agencies, payer programs to confirm the standards going forward.

Next Steps. Hopefully, your organization has already begun preparing for the end of the PHE. If not, you should immediately:

- Review the HHS guidance identified above along with state rules to confirm necessary changes.
- Identify practices and arrangements that must be revised to maintain or return to regulatory compliance.
- Update policies and practices and train staff concerning the changes.
- Continue to monitor developments, including new legislation or agency action concerning applicable standards.

Failure to take steps now may expose your organization to liability for noncompliance once the PHE ends, including denial or repayment of reimbursement, False Claims Act liability, and/or other penalties.

¹ HHS, “Fact Sheet: COVID-19 Public Health Emergency Transition Roadmap,” available [here](#).

² See *id.*; see also CMS, “CMS Waivers, Flexibilities, and the Transition Forward from the COVID-19 Public Health Emergency,” available [here](#). For hospitals, see AHA, “Public Health Emergency to End May 11,” available [here](#).

³ CMS, “Creating a Roadmap for the End of the COVID-19 Public Health Emergency,” available [here](#).

⁴ HHS, “Telehealth policy changes after the COVID-19 public health emergency,” available [here](#).

⁵ *Id.*

⁶ *Id.*

⁷ DEA, “DEA Announces Proposed Rules for Permanent Telemedicine Flexibilities,” available [here](#).

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